

## **EXHIBIT 3**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

In re: )  
PHARMACEUTICAL INDUSTRY ) CA No. 01-12257-PBS  
AVERAGE WHOLESALE PRICE ) MDL No. 1456  
LITIGATION ) Pages 1 - 48

MOTION HEARING  
BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
October 26, 2006

LEE A. MARZILLI  
CERTIFIED REALTIME REPORTER  
United States District Court  
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Boston, MA 02210  
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1 A P P E A R A N C E S:

2 For the Plaintiffs:

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9 For the Defendants:

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P R O C E E D I N G S

THE CLERK: In re: Pharmaceutical Industry Average Wholesale Price Litigation, Civil Action No. 01-12257, MDL No. 1456, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. GOBENA: On behalf of the United States, Gejaa Gobena.

MR. MAO: Andy Mao for the government.

MR. SOBOL: On behalf of the relator, Ven-A-Care of the Florida Keys, James Breen.

MR. HENDERSON: George Henderson.

MS. BROOKER: Renee Brooker on behalf of the United States.

MR. DALY: Good afternoon, your Honor. Jim Daly for Abbott Laboratories.

THE COURT: Good. Today we have the motion to dismiss pending, is that right?

MR. GOBENA: That's correct, your Honor.

MR. DALY: Yes, your Honor, and the CMO motion I think is up today as well, if that fits with your schedule.

THE COURT: Well, let me say this. Unfortunately, I have an emergency motion for a preliminary injunction that was filed, and I need to hear them at 4:00 o'clock. So we can handle this in two ways. You're all here, and so of course I'm going to hear you on the motions to dismiss. We

1 can get through as much as I can on the case management  
2 order, but I don't have all afternoon. So if I gave you  
3 fifteen minutes a side on the argument, I don't know if  
4 that's enough time, with five minutes apiece for rebuttal.

5 MR. DALY: It might take slightly longer than that  
6 on my end, your Honor, slightly more than the fifteen  
7 minutes, but hopefully I can get as close to that as  
8 possible.

9 THE COURT: Well, you might have to come back.  
10 Where are you from?

11 MR. DALY: I'm from Chicago, Judge. I'm happy to  
12 come back.

13 THE COURT: And you're all from D.C.?

14 MR. BREEN: Atlanta.

15 THE COURT: Atlanta? One possibility would be  
16 tomorrow morning, if you wanted to stay over, if we don't  
17 finish. This is a motion for preliminary injunction  
18 involving the election coming up, which just came in the  
19 front door, and I've got to do it, okay. So I could see you  
20 all tomorrow morning if we don't finish, but why don't I not  
21 take any more time on that, see how far we go, and then we'll  
22 see what needs to be addressed on the case management order.  
23 Sound okay?

24 MR. DALY: Yes, your Honor.

25 THE COURT: Great. Your motion, sir.

1 MR. GOBENA: NDC probably.

2 THE COURT: Right, the NDC. And then your point is  
3 that implicit in that, it will be reimbursed at the AWP. He  
4 says that's not enough for a false claim.

5 MR. GOBENA: That triggers the process, in our  
6 view, that leads to the submission of a claim --

7 THE COURT: All right, I've got the debate. Okay.

8 MR. DALY: I don't think that's a false claim. I  
9 think they can sue us for fraud if they want to.

10 THE COURT: Which they have done.

11 MR. DALY: Yes, which they have done. So it's a  
12 square-peg-round-hole problem. To answer the question about  
13 the Poe case, if you look at it, Judge, there's no analysis  
14 of whether or not you can use the Anti-Kickback Statute on an  
15 implied certification theory for Medicaid. All it does is,  
16 it recites in a footnote that, you know, Paragraph 42 of the  
17 complaint alleged Medicare and Medicaid. There's no analysis  
18 of the question that I think is presented to the Court today,  
19 which is, can you use it in that way?

20 And then, finally, just to be clear, I'm not saying  
21 that I think that in the Medicaid context, certainly that  
22 submitting it to the state creates a false claim. I still  
23 have my other arguments that there's still nothing false  
24 about that.

25 THE COURT: Sure. Okay, I understand the debate.

1 We've got to move on. What did you want? We need to get  
2 discovery going, right?

3 MR. DALY: Yes, your Honor, absolutely.

4 THE COURT: So are you ready to do like a  
5 scheduling order?

6 MR. GOBENA: Well, your Honor, there's actually --

7 MR. DALY: We are. I think we've submitted  
8 competing orders to the Court which, you know, sort of differ  
9 in that we want to move quickly, and they want to move less  
10 quickly, we want more, they want less, generally speaking.

11 MR. GOBENA: Your Honor, Ms. Brooker is going to  
12 address that.

13 MS. BROOKER: Your Honor, I would just say briefly,  
14 if your Honor is not going to hear either today or tomorrow  
15 the briefs, we would -- we were initially before Judge Bowler  
16 on Monday on this issue, so the government did not file a  
17 reply. We were going to seek leave to file a reply. To the  
18 extent that your Honor doesn't want to hear that today --

19 THE COURT: Do you want me to just do it on the  
20 papers?

21 MR. GOBENA: We could do it on the papers, your  
22 Honor, or we could appear before your Honor. I think there  
23 are more issues involved than simply, you know, they want no  
24 limitations in our case and we want a different number.

25 (Discussion off the record.)

1 THE COURT: So how much time do you want?

2 MS. BROOKER: I would say, your Honor, I was  
3 planning on about 20 minutes you know.

4 THE COURT: Okay, for the discovery.

5 MS. BROOKER: Oh, I'm sorry. I thought you meant  
6 to argue.

7 THE COURT: Twenty minutes, that's going to be the  
8 quickest case in Federal Court yet.

9 MS. BROOKER: I think it will take a lot longer  
10 than that, your Honor. In terms of the time period for  
11 discovery, is that your question?

12 THE COURT: Yes.

13 MS. BROOKER: Well, that really depends on the  
14 scope of discovery, which is what we've argued in our CMO.  
15 But the government believes that if the scope of discovery  
16 is -- if the parameters are set as they should be, that this  
17 case could be -- you know, we could go through the discovery  
18 process in eighteen months.

19 THE COURT: How much do you need?

20 MR. DALY: Judge, there's a very large issue in  
21 what counsel just indicated. In terms of the scope of  
22 discovery, that's the big issue for the CMO. They're trying  
23 to say that my client doesn't get any discovery of government  
24 knowledge, government policy; all these things that are on  
25 the board up there, they're irrelevant to the case; and



1 Abbott doesn't need any discovery on it whatsoever. It's a  
2 big issue for us. We think it's one that we win. We think  
3 that -- but that's the big issue on the CMO.

4 We've proposed a year, Judge. We think that this  
5 case has been pending --

6 THE COURT: The debate is between a year and  
7 eighteen months? Is that the debate? Can't I resolve that  
8 right now? Why don't I say halfway between the two?

9 MS. BROOKER: Your Honor, the debate is that we say  
10 eighteen months, but we say that parameters should be set on  
11 the scope of discovery within eighteen months.

12 THE COURT: Why can't they get what you guys know  
13 and did?

14 MS. BROOKER: Well, your Honor, we disagree with  
15 that position.

16 THE COURT: Why?

17 MS. BROOKER: We have not taken the position that  
18 there should be no discovery on government knowledge. Our  
19 position is much more refined than that. What we have said,  
20 however, is that defendants are not entitled to have  
21 discovery on the entire federal government, which is  
22 essentially what they're seeking for all pharmaceutical  
23 companies, for all drugs, for the last forty-one years.

24 THE COURT: Oh, I see.

25 MS. BROOKER: It's not limited to Abbott's specific

1 conduct and Abbott's drugs, and it's certainly not limited to  
2 HHS and CMS.

3 THE COURT: I'm not going to resolve the scope of  
4 discovery issue right this second. What I am going to do is  
5 kick-start this case.

6 MR. DALY: Thank you.

7 THE COURT: Because as far as I'm concerned, you've  
8 been dealing with it since 1995 -- maybe not you  
9 personally, but it's been around since 1995 -- and I'm going  
10 to open up everything that happened in MDL. We're going to  
11 have a trial starting in two weeks.

12 By the way, has the government, have you made a  
13 decision about whether these folks are going to testify?

14 MR. HENDERSON: Your Honor, CMS has denied -- and  
15 there's been an emergency motion by the defendants, CMS has  
16 denied the Touhy Request. I'd also note that there are no  
17 subpoenas out.

18 THE COURT: For trial, for the trial. For trial  
19 subpoenas or just -- I've already ruled on the pretrial  
20 depositions.

21 MR. HENDERSON: There are no trial subpoenas  
22 outstanding. I mean, these people are beyond the subpoena  
23 power of the court. They're not within the district.

24 THE COURT: All right, so then it's full square up  
25 for this case, right?

1 MR. HENDERSON: I'm sorry?

2 THE COURT: Because, I mean, I denied the request  
3 just because it's too late for discovery, but this case is in  
4 a different posture, so I'm going to have to deal with this  
5 case.

6 MR. HENDERSON: Yes.

7 MS. BROOKER: Your Honor, if I may be permitted to  
8 say one more brief thing, I didn't want to leave your Honor  
9 with a misimpression.

10 THE COURT: Yes.

11 MS. BROOKER: Our position is that Abbott  
12 specifically, and Abbott as lead counsel on discovery in this  
13 MDL proceeding as well as the Lupron MDL proceeding, has  
14 received all discovery on broad government knowledge. That's  
15 why they have all these government reports, for example.

16 THE COURT: So they can have everything that  
17 happened in the MDL. You probably have it anyway.

18 MR. DALY: Well, we have that anyway, Judge.

19 MS. BROOKER: What we're seeking to set parameters  
20 on is Abbott starting discovery, and if your Honor opens the  
21 gates now and says "go," Abbott is going to be seeking  
22 discovery against all of the Department of Defense on all  
23 pharmaceuticals for forty years, the same thing with the  
24 Department of Commerce, the same thing with the VA.

25 THE COURT: And you'll move for a protective

1 order. So, you know, the truth is, I'm just doing a  
2 scheduling order. I'm not going to resolve every issue in  
3 this litigation going forward. And this is huge, you know,  
4 how much was -- you know, this is huge. I'm not going to  
5 decide every single one of those issues right now. What I am  
6 going to do is fifteen months for discovery, all right, not  
7 being too Solomonic about it. I think that's actually  
8 incredibly generous, given the fact of how much has happened  
9 so far. And so that pulls us till -- so, like, through  
10 December 31 of next year? Does that sound roughly okay?  
11 Then January 31 for the government's expert reports; and  
12 February 28, assuming it's not a leap year, for the Abbott  
13 expert reports; April 30 for the expert discovery.

14 MR. DALY: Deposition.

15 THE COURT: And so I might be willing to guess, if  
16 I don't, that at least on all remaining claims, I am likely  
17 to see motions for summary judgment.

18 MR. DALY: It's possible, your Honor.

19 THE COURT: Just possibly. So I think we'll  
20 probably do -- why don't we just say June 15 for a motion for  
21 summary judgment. Is this pushing it out too far? Do you  
22 think this is --

23 MS. BROOKER: No.

24 THE COURT: July 15 for the opposition, August 1  
25 for the reply, August 15 for the surreply. And the next

1 group of law clerks can get the whole shebang for the motion  
2 for summary judgment.

3 When do you want to go to mediation?

4 MR. DALY: Can we get together and propose  
5 something?

6 MS. BROOKER: We can propose something, your Honor.

7 MR. DALY: Or you can just stick the date anywhere  
8 in there.

9 THE COURT: You know, there are just a bunch of --  
10 we could send it to the United States magistrate judges. I  
11 think, in this kind of case, you may want to go to the people  
12 who deal with the really big stuff. And why don't you both  
13 talk within two weeks and send me letters and counter letters  
14 for a proposed settlement.

15 Now let me ask the government this. Is this just  
16 the first?

17 MR. HENDERSON: That's what I wanted to speak to,  
18 your Honor. I'm one of the counsel on another case that's  
19 been filed, an AWP case that's before Judge Lasker against  
20 Dey, Incorporated. And we intervened a couple of months  
21 ago. Dey has not answered. We did file a notice of related  
22 case before Judge Lasker. Judge Lasker probably hasn't  
23 looked at it. And we've asked Dey on its position about a  
24 motion to transfer to the MDL.

25 THE COURT: How many more am I going to look at

1 brought by the federal government against the drug  
2 companies?

3 MR. HENDERSON: I can't answer that, your Honor,  
4 but at this point in time, I do anticipate that there will be  
5 an additional case.

6 THE COURT: At least the Dey case?

7 MR. HENDERSON: Well, the Dey case is before  
8 Judge Lasker and then one additional to that. Beyond that, I  
9 can't really say.

10 THE COURT: Well, here's my issue. When will all  
11 this be happening?

12 MR. HENDERSON: Well, the Dey case anytime. I  
13 think that we've agreed that their response to the complaint  
14 is due in late December, December 22.

15 THE COURT: Because my concern is really to some  
16 extent internally with resources with me. At this time  
17 around I've been very lucky, the First Circuit has given me a  
18 third law clerk. I mean, as you all know, this is huge, and  
19 I just need to have a sense of what's going on. So maybe  
20 during at some point the trial as it's coming up, I'm just  
21 going to need to know what's happening on the big picture.

22 MR. HENDERSON: Well, in addition, one of the  
23 things I'm concerned with, your Honor, is that we go through  
24 a lot of discovery by Abbott against the government, and then  
25 Dey says, "Well, wait a second; we didn't have the

1 opportunity to participate in that discovery. We've got to  
2 retake these same depositions all over again." And then a  
3 few months later we have another defendant who says, "Well,  
4 we've got to depose these people."

5 THE COURT: Well, that may happen. I don't know  
6 how to protect against it other than the fact I'd incorporate  
7 the deposition, and they just would supplement and not start  
8 from base one, you know?

9 MR. HENDERSON: Perhaps, if we could at least get  
10 the Dey case before the Court and discovery proceedings  
11 consolidated on the same schedule.

12 THE COURT: That will be another day, huh? All  
13 right, it's been a long day. I've got to go. I have this  
14 other case. So why don't we do this. I've been more focused  
15 on the motion to dismiss, I have to confess, than the CMO.  
16 I'm moving it. It's going. You file your inevitable, as day  
17 follows night, deposition subpoenas. You're going to move  
18 for a protective order, and I'll either refer it to  
19 Judge Bowler, or if I think it's a cutting-edge issue, I'll  
20 take it myself, or maybe give her the first crack at it. It  
21 will be, you know, appealable if people didn't like the  
22 results of it. I'll just play that by ear, but I don't want  
23 to just -- this needs to get going. It's been pending since  
24 1995, right? So good, thank you.

25 (Adjourned, 4:07 p.m.)



C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court  
Reporter, do hereby certify that the foregoing transcript,  
Pages 1 through 48 inclusive, was recorded by me  
stenographically at the time and place aforesaid in Civil  
Action No. 01-12257-PBS, MDL No. 1456, In re: Pharmaceutical  
Industry Average Wholesale Price Litigation, and thereafter  
by me reduced to typewriting and is a true and accurate  
record of the proceedings.

In witness whereof I have hereunto set my hand this  
2nd day of November, 2006.

LEE A. MARZILLI, CRR

OFFICIAL FEDERAL COURT REPORTER